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No. 85-5319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the deliberate and tactical choices of counsel, though ultimately unsuccessful, lessened the Eighth Amendment's requirement of reliability that the sentence of death was appropriate?

2. Whether the excusal of venireman Murphy met the standards of review announced in Wainwright v. Witt, 468 U.S. ___ (1985)?

3. Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his trial?

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STATEMENT OF THE CASE

STATEMENT OF THE FACTS: James Carl and Helen Turman owned a furniture store doing business as Carl's Furniture in Lakeland, Florida. Mrs. Turman ran the store, and her husband worked at a juvenile home. (TT 200)* The couple lived in a house located behind the furniture store. (TT 201) On September 8, 1973, Mr. Turman was working a midnight

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*The state trial record consists of eight volumes and a one volume supplement. The first two volumes are successively numbered through page 370 and contain the indictment, motions, and transcripts of hearings. References thereto will be made by the designation "R" followed by the appropriate page number. The transcript of trial proceedings, including voir dire examination, begins in volume III and goes through volume VIII with pages being successively numbered 1 through 918. References to that part of the re-record will be designated by "TT" followed by the appropriate page number. References to the supplement to transcript of record will be designated by "SR" followed by the appropriate page number. The transcript of the habeas corpus hearing will be designated "HC" followed by the appropriate page number. All other references will be made to the joint appendix or supplemental appendix by the designation "JA" or "SA" followed by the appropriate page number.

shift and at approximately 5:00 p.m. his wife called to awaken him. Shortly thereafter, he came over to the store and had a cup of coffee. Mr. Turman returned to the house to let the dogs out for a run. Mrs. Turman stepped outside of the store and closed the door and watched. After the dogs' run, the Turmans put the dogs back in the house and Mrs. Turman returned to the store alone sometime between 5:30 and 6:00 p.m. (TT 233)

As she opened the back door of the store, she confronted Willie Jasper Darden. But for Mrs. Turman and Mr. Darden, the store was empty. In response to his request, Mrs. Turman showed Darden around the store. Apparently, Darden then left telling Mrs. Turman that his wife would be back. (TT 205) He then returned asking to see some stoves. After an inquiry of price, Mrs. Turman started toward her adding machine. (TT 205) At

that point Darden grabbed Mrs. Turman, stuck a gun in her back, and said, "Do as I say and you won't get hurt". (TT 206) He then pulled down a loading door and asked Mrs. Turman for a key to the glass-sliding door. (TT 206) When told there was no key, he ordered Mrs. Turman to fasten the door with a stick and told her, "Don't try anything funny". (TT 206)

Darden then took Mrs. Turman to the back of the office and told her to open the cash register. He emptied the cash register of only the bills which Mrs. Turman estimated amounted to no more than $15.00. He ordered Mrs. Turman to the back of the store where she became weak. (TT 207) As Mrs. Turman was being taken to where some boxsprings and mattresses were stacked against the wall, Mr. Turman appeared at the back door and was warned by his wife not to come in.

(TT 208) Darden shot Mr. Turman between the eyes, and then pointed the gun at Mrs. Turman and said, "Stand still, don't move". (TT 208) While holding the gun on Mrs. Turman, Darden went over to her fallen husband and tried to pull him into the building and close the door, but was unable to because one of Mr. Turman's feet was in the way. (TT 209)

Darden then told Mrs. Turman to get down on the floor at a point approximately five feet away from her husband. (TT 210) Mrs. Turman asked if she could go to her husband and Darden replied that he was all right, that he only shot him in the shoulder. (TT 210) He then told Mrs. Turman to take out her teeth and at the same time unzipped his pants and undid his belt buckle. (TT 210) He told Mrs. Turman to suck his penis. (TT 210) Mrs. Turman cried, "Lord, have mercy". (TT 210) She again cried, "Lord, have

mercy", and Darden told her to get up and to back towards the front of the store.

As the two were walking toward the front of the store a young neighbor and part-time employee, Phillip Arnold, aged sixteen, opened the back door. (TT 211) Mrs. Turman screamed for him to go back. (TT 212) Darden left Mrs. Turman and ran toward Phillip Arnold.

Phillip Arnold's mother had told him that something had happened to Mr. Turman and for him to go help Mrs. Turman. (TT 430) He ran to the store, and as he got to the back door he saw Mr. Turman lying partially in the building. (TT 432) Phillip attempted to bring Mr. Turman into the store and heard Mrs. Turman say to go back. (TT 433) He didn't know what she meant and instead asked Darden to come help get Mr. Turman indoors. (TT 433) Darden said something to the effect of "Sure, buddy, I will help you". (TT

433) As Phillip looked up, Darden was pointing a gun at his face. (TT 435) Darden pulled the trigger and the gun "clicked". (TT 436) Darden pulled the trigger again and shot Phillip Arnold in the mouth. (TT 436) Phillip Arnold started to run away from the store, and Darden shot him in the neck. (TT 436) As he was still running away from the store, Darden shot Phillip Arnold yet a third time. (TT 437)

Petitioner's statement regarding the weapon is only partially accurate. The firearms expert testified that although the surface mutilation to the bullet made it unable to positively state that the bullet had been fired from the gun, it was his expert opinion that it could have been fired from that particular weapon. (TT 347) The width of the grooves, the number of grooves, the direction of the twist of the rifling was

exactly the same as those produced by that weapon. (TT 349) Additionally, the arrangement in the cylinder of the weapon when found was such that if the exact sequence of shots and the click had been duplicated, the hammer-to-bullet relationship would be, and was, identical. (TT 521, 522, 537, 542)

Petitioner's statement of fact regarding the identification likewise is incomplete and to a certain degree inaccurate. Mrs. Turman never told the officers that she could not remember what Darden looked like. Under cross-examination, Mrs. Turman testified only that she was poor at giving definite descriptions of people, but that she very definitely did remember faces. (TT 232) She never paid much attention to how customers dressed. But, she remembered her customers. (TT 232) While it is true she was scared during the incident and at one

point put her hands over her face, that occurred after Darden had shot Phillip Arnold. (TT 281) Her face was uncovered during the times she was showing Darden the furniture, when he took the money out of the cash register, and when he attempted to have her perform the sexual act. (TT 281)

Petitioner's statements regarding the identification at the preliminary hearing is likewise insufficient. Between the time her husband was killed and the time of the preliminary hearing, Mrs. Turman had read no newspaper account of the incident and had not seen any photograph of Darden. (TT 230) No police officers or any other individuals had even attempted to show a photograph of Darden to the woman. The identification took place only five days after the incident. Mrs. Turman had viewed Darden for approximately ten minutes

during the incident. (TT 230, 231) Mrs. Turman recognized Darden when she came into the courtroom, (TT 283) and even with his back to her, she recognized Darden as the one who shot her husband. (R 53)

Mrs. Turman repeatedly and positively identified Darden at trial.

The remainder of appellant's statement of facts is supported by the record notwithstanding his dramatic embellishment thereof. Respondent would only add that although venireman Murphy was excluded after being asked but one question, his excusal came after that question, in exact or approximate form, had been asked repeatedly and after several other prospective jurors had been excused for the same reason.

An addition to petitioner's statements regarding the closing argument is the fact that no objection was made to

any of the allegedly inflammatory remarks. One objection was made to a statement of the prosecutor on the grounds that the statement lacked evidence. (TT 751) Another statement was made by the defense requesting the court to again instruct the prosecutor to stick to the evidence. (TT 791)

The lack of objection was due to a deliberate and tactical choice of counsel. (SA 46) Defense counsel Goodwill had known prosecutor McDaniel since law school, and felt that if allowed, McDaniel would make such an argument that it would constitute reversible error on appeal. (SA 47) Goodwill specifically prevented junior defense counsel Maloney from objecting to a remark made early in the prosecutor's argument. (SA 46) After Goodwill felt McDaniel had gone far enough, he leaned over and told Maloney to object. (SA 69) The reason for this

tactic was, in the event of not securing a verdict of not guilty, to allow the commission and preservation of automatic error for appeal. (SA 47) The purpose of that was to secure a new trial and attendant delay so that the passage of time might help the situation. (SA 48)

SUMMARY OF ARGUMENT

Under the facts and circumstances of this case, the deliberate choice not to object to the prosecutor's closing argument so that automatic reversible error would be committed, was reasonable. Although that choice permitted improper and tasteless remarks to be made, those remarks did not rise to a level which either destroyed the fundamental fairness of the guilt phase or in any way lessened the reliability that the sentence of death was improperly imposed.

Given the fact that venireman Murphy was present in the courtroom during the entire process of voir dire which preceded his being called into the jury box, his answer to the one question made it sufficiently clear that his views towards capital punishment would not enable him to follow his oath as a juror

and the law as instructed.

Since no additional relevant mitigating evidence was available at the time of trial, and none has been offered now, Darden's lawyers rendered effective assistance of counsel during the sentencing phase of trial. Neither operation of law nor other perceived basis created the belief that presentation of evidence in mitigation was restricted to that statutorily enumerated.

ARGUMENT

I

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE CLOSING ARGUMENT OF THE PROSECUTOR, WHILE IMPROPER, DID NOT LESSEN RELIABILITY THAT THE DEATH SENTENCE WAS PROPERLY IMPOSED

Procedural posture of the issue.

The writ in this case is directed to the judgment of the court of appeals reported as Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985). That judgment, reinstating the panel opinion, 699 F.2d 1031, affirmed the district court's denial of Darden's habeas corpus petition. On the issue of closing argument, the original judgment of the court of appeals was in agreement with the district court's conclusion that the prosecutor's comments did not deny Darden a fundamentally fair trial. This judgment was in response to Darden's claim that the arguments were

so prejudicial as to constitute a denial of his right to due process. Neither the district court nor the court of appeals passed any judgment on the issue of whether the closing arguments deprived Darden of any rights under the Eighth Amendment. Although Darden has in one form or another claimed that the closing arguments affected sentencing, the issue he originally framed to the district court was one directed solely to the effect the remarks had on the determination of guilt or innocence. Admittedly, Darden urged the court of appeals to consider the issue in all his petitions for rehearing. The fact remains, though, that the court of appeals reviewed only the determination of the district court that the verdict was not the product of a fundamentally unfair trial.

As such, the court of appeals has rendered no judgment on Darden's Eighth

Amendment claim. This fact appears to have been overlooked by the two dissenting judges who presumably voted to rehear the cause for a fourth time and would have considered the issue. Darden v. Wainwright, 772 F.2d 666 (11th Cir. 1985). We submit, however, that the desire of two judges of the court of appeals is not equivalent to the judgment of the en banc court.

Therefore, unlike the situation in Caldwell v. Mississippi, 472 U.S.___, 105 S.Ct. 2633, this Court does not have the benefit of the lower court's views on the issue. That being true, it is suggested that even Caldwell would render this claim jurisdictionally deficient.

Merits of the claim. In spite of the above, should the issue be considered properly before the court, we offer the following in response to the merits of the claim in light of the unique

procedural history of this case.*

Caldwell established that the Eighth Amendment requires considerable reliability in the determination that

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*The willingness to consider the closing argument issue on the merits has been consistently expressed by all courts despite the state's just as consistent reliance on the procedural default. On direct appeal of the Florida Supreme Court, the state's sole position was the lack of specific objection to the allegedly inflammatory remarks. On certiorari review in this Court, we again stressed not only lack of objection, but also the failure to raise a federal question. In district court, we initially relied on the lack of objection but then after hearing, included the position that the lack of objection was due to a deliberate and tactical choice. Indeed, the state even cross-appealed the failure of the district court to properly consider and apply the choice not to object and resultant waiver of the issue, relying on Garrison v. McCarthy, 653 F.2d 374 (9th Cir. 1981). The panel opinion, 699 F.2d 1091, confused the basis of the state's cross-appeal with that part of its brief observing that the district court's suggestion that Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979), could allow the application of Wainwright v. Sykes, 433 U.S. 72 (1977), so as to bar considerations of the claim on the merits. Also, contrary to the panel opinion, the state has never suggested that the Florida Supreme Court did not consider the claim on the merits; it was our suggestion that since the court also applied the state's contemporaneous objection rule, procedural default was a viable basis to affirm. See the state's petition for rehearing to the panel opinion, pp. 3-4.

death is the appropriate sentence in a specific case. That which undermined the reliability in that case was a statement of the prosecutor, repeated by the trial judge, made to the sentencer--the jury. For the reasons expressed, the determination that death was appropriate was rendered unreliable.

Given this need for reliability, the operative issues as we view them are whether a prosecutor's closing argument during the guilt phase of the trial which had purposely been allowed to blossom into impropriety, under the facts and circumstances of this case, had any effect on the jury's decision to recommend the sentence of death. If there was such an effect, did it either lessen or destroy the requirement of reliability in that recommendation. If it did, does the Eighth Amendment allow the tactical choices of counsel to bind a capital

defendant and if so, to what degree.

Standard of review. The propriety of a prosecutor's closing argument in a federal prosecution was recently reviewed by this Court in United States v. Young, 470 U.S. ___, 105 S.Ct. 1058 (1985). At issue was whether the "plain error" concept embodied in Federal Rule of Criminal Procedure 52(b) permitted review of the argument in the absence of a timely objection by the defense. In resolving the issue, the Court stressed not only the doctrine of fundamental fairness, but also the notion that prosecutors remarks, even though inappropriate and amounting to error, must undermine that doctrine before a finding of "plain error".

In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(en banc), the court reviewed the closing arguments of a prosecutor in a Georgia capital case. The

court formulated a standard of review by borrowing from the principles announced in Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984). The court considered the prejudice element of the Strickland test as directly analogous to the fundamental fairness inquiry required to be applied in cases alleging improper prosecutorial argument. Donnelly v.DeChristoforo, 416 U.S. 637 (1974). In determining whether the remarks of the prosecutor produced a reasonable probability that they changed the outcome of the case, the court identified several reasons why it thought the Strickland test should apply to this issue.

The court found the Strickland test has as its objective the determination of fundamental fairness, is analytically similar to review of closing arguments since each remark must pass the threshold question of whether prejudice

had resulted, is sufficiently flexible to recognize errors of varying magnitude, and, is consistent with the standards discussed in Donnelly and subsequent cases employing the fundamental fairness standard by measuring the impact of the remarks against the strength of the case presented by the prosecution.*

We suggest that the Eleventh Circuit's approach to this issue and the standard of review it now applies is worthy of adoption by this Court.

Application of the standard to this particular case. All courts which have reviewed the closing remarks of the prosecutor have determined that the remarks did not destroy the fundamental fairness of the trial. All courts have

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*Last term in United States v. Bagley, (84-48, July 2, 1985) the Strickland "reasonable probability" test was considered sufficiently flexible so as to properly apply to a determination of whether non-disclosed evidence is material.

measured the impropriety of the remarks against the strength of the evidence against Darden and concluded, implicitly, that there was no reasonable probability that they changed the outcome of the case. In other words, there was sufficient evidence upon which to properly return a verdict of guilty without consideration to the remarks or the possible effect thereof. If the remarks did not unconstitutionally compromise the verdict against Darden, then it naturally follows that their effect on the sentencing recommendation was necessarily less, if any at all.

In this regard, we think it appropriate for Darden to be required to do more than merely quote the prosecutorial remarks, (time after time) inject considerations of race, malice and other emotional negatives, and then boldly assert the existence of prejudice--a sort

of constitutional "res ipsa loquitur". He does this, however, despite no court ever accepting the proposition. But for a magistrate and a few dissenters, the remarks have been universally tolerated, not condemned. This is especially focal since if the effect of the remarks did not destroy the fairness of the verdict which was the product of the jury, then it follows that the effect was even less (or none) on the sentence, which was not. Darden has failed to demonstrate how and why the remarks eliminated the reliability of the sentence. To be sure, none of the reasons producing reasons to fear substantial unreliability in Caldwell, are present here.

Although we maintain that no improper influence entered into the recommendation of death, as against the possibility that in a capital case prejudice would or could be presumed, prejudice here,

if any,must be measured in terms of that which produced it, i.e., the lack of objection. It was this omission which was responsible for anything past the very first objectional remark. This fact not only satisfied the "cause and prejudice" of Wainwright v. Sykes, 433 U.S. 72 (1977), but also the test which Sykes rejected: the knowing and deliberate waiver of Fay v. Noia, 372 U.S. 391 (1963). To ignore this would in turn ignore the concept of "sandbagging" which was specifically targeted as being eliminated in Sykes.

As a general statement, decisions relating to trial strategy are binding on the defendant. Henry v. Mississippi, 379 U.S. 443 (1965), Estelle v. Williams, 425 U.S. 501 (1976). We would not extend this principle as a hard and fast rule in capital cases which would automatically bar habeas corpus relief. Obviously

some tactical choices would be patently ridiculous. We would not demand that in those instances a capital defendant must suffer the consequences.

We submit that the binding effect of tactical choices can be measured and that the proper standard to be utilized is one of reasonableness. We submit further that the binding nature of tactical decisions places a burden on the defendant to show that the choice not to object was unreasonable under the facts and circumstances of a given case.

Here, Darden has failed even to acknowledge the reason for failing to object, much less discuss the rationale behind it. He ignores the very heart of the issue, and, by constantly harping on the irrelevant, he employs the identical tactic which he so vigorously attacks.

We contend that the decision not to object was reasonable. Based on his

knowledge and association with the prosecutor, defense counsel Goodwill expected McDaniel, as Goodwill put it ". . .to get much more vehement in his remarks if you allowed him to go on. . ." (SA 46) That Goodwill's expectations were fully realized is a classic understatement. McDaniel immediately started in on the Division of Corrections, (JA 15) and while he may have uttered many pointless and tasteless remarks, he failed to discuss the issues, the weight of the evidence, or the credibility of the witnesses. (SA 71) Goodwill capitalized on this and delivered a very skilled closing argument which emphasized the impropriety of the prosecutor, questioned the eyewitness testimony, and stressed the lack of hard evidence. From the very beginning, Goodwill attitudinized the jury against the prosecutor by referring to the prosecutor's yelling at

the jury; (TT 788) attempting to convict not on evidence, but on the strength of argument; (TT 786) putting the jury on trial; (TT 787) desiring to be an executioner; (TT 791) and storming around the courtroom slapping paper attempting to embarrass the jury into a verdict. (TT 794) Goodwill effectively neutralized the prosecutor's outrage by emphasizing that the righteous indignation present in closing argument was absent during cross-examination of the defendant himself. (TT 801)

During and after his condemnation of the prosecutor's antics, Goodwill continuously hammered on the evidence the state failed to produce and the weakness of the evidence it did produce. He stressed the possibility of mistaken identity, focusing on Phillip Arnold's medical condition (TT 788-790) and Mrs. Turman's state of shock and the discrepancies in

her prior descriptions. (TT 796) He argued that the gathering of evidence by the authorities was woefully insufficient, driving home the point that as soon as Darden was apprehended, the investigation seemed to have stopped. He reminded the jury that no paraffin test was administered (TT 813), no fingerprinting was done, (TT 814) and no footprints, tire tracks, or any other physical evidence was gathered. (TT 814, 815)

Based on the foregoing we state that under the facts and circumstances peculiar to this case, and this case alone, the remarks of the prosecutor did not improperly influence the jury's recommendation.* Since the possibility of

*Unlike the scheme in Mississippi, a Florida capital jury renders an advisory recommendation but does not actually sentence. The great weight requirement, Tedder v. State, 322 So.2d 908 (Fla. 1975), had not yet been decided at the time of Darden's trial. However, the trial judge indicated that he would put great weight in what the jury thought and what the jury recommended. (TT 905)

improper affect on the recommendation was at least remote, the reliability of the sentence ultimately imposed was in no way compromised.

In Murch v. Mottram, 409 U.S. 41 (1972), a state trial judge advised defense counsel that the defendant was required to bring all his claims, including the constitutional challenge subsequently asserted, at that time or they would be waived. After conference with the client, counsel elected not to pursue the issue. Subsequently, in a federal habeas corpus court, the defendant testified that he had not intended to waive his constitutional attacks in the state court post-conviction proceeding. This Court rejected the notion that a subjective declaration not to abandon or waive a claim could suffice to preclude a finding of a deliberate by-pass of orderly state procedures. If it could, then valid state

procedures with legitimate interests aimed at being served thereby would be utterly meaningless. The principles of Murch significantly add to the proposition that under the facts and circumstances of this case, the deliberate choice not to object was reasonable and thus binding on the defendant.

Terminally, we observe that evidence of the aggravating factors was proven beyond a reasonable doubt. Despite the recommendation of the jury and whatever weight was assigned to it, the sentencer still detected two factors in mitigation. It occurs to us that if the arguments infected the recommendation, and the recommendation in turn infected the actual sentence, then the likelihood of finding those factors in mitigation would have been non-existent. There simply is no reasonable probability that, absent the alleged prejudice of the

remarks, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

II

PROSPECTIVE JUROR MURPHY WAS PROPERLY EXCUSED FOR CAUSE SINCE HIS VIEWS TOWARD CAPITAL PUNISHMENT SUBSTANTIALLY IMPAIRED HIS DUTY AS A JUROR TO FOLLOW THE LAW

Darden's argument is one limiting consideration of the issue to an isolated situation which he alone creates. As has been appropriately observed:

> To suggest that the trial court's ruling was based upon one question and one answer is to ignore reality (and the record of the state court's proceedings).*

Proper perspective reveals that venireman Murphy was the last of several who were excused for cause because of views towards capital punishment.

Murphy had been present in the

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*Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984) en banc, Fay, dissenting. Judge Fay authored the original panel opinion finding no Witherspoon violation. The passage quoted above is from his dissent from the en banc opinion which did find a Witherspoon violation. After remand from this Court, however, Judge Fay's views commanded those of ten members of the court.

courtroom and presumably had listened to the entire voir dire proceedings which preceded his being called into the box. It is more than a fair conclusion that based on the respective exchanges regarding capital punishment, he certainly had time to reflect on his views toward the issue. While he may have been asked but one pertinent question, the fact remains that his answer was not something considered in a vacuum.

Darden admits that a proper standard was employed by the court of appeals. He complains, however, that the finding is not entitled to any degree of deference because the record fails to provide fair support for that finding. It is therefore propitious to compare the record in this case with that in Wainwright v. Witt, 469 U.S. ___, 105 S. Ct. 844 (1985).

In Witt, juror Colby could only

provide her thought that her personal beliefs would interfere with her sitting as a juror. She was asked only if she had religious or personal beliefs against the death penalty and whether those beliefs would interfere with her sitting as a juror in the case. Her strongest response to the pertinent question was that she thought so. Interestingly, none of the inquiries sought her beliefs in terms of the facts which might be proven. Here, Murphy was asked about his principles in opposition to the death penalty which would be violated to the extent that he would be unable to vote to recommend the death penalty regardless of what the facts might show. It was asked of Murphy whether those feelings were "so strong", and his answer was an unequivocal, "yes".

Respondent strongly submits that when Murphy told the trial judge that

his principles were such that he could not vote to recommend a penalty regardless of the facts, he was one who could not abide by his oath as a juror to follow the law. To conclude otherwise, would necessarily ignore Witt.

Unlike the situation relating to Mrs. Colby in Witt, no ambiguity is present whatsoever and thus, there probably existed no compelling need to assess Murphy's demeanor in determining the meaning of his answer. 105 S.Ct. at 857.

What's more, the excusal of Murphy (as well as all others so excused) was not made the basis of a specific objection that the principles of Witherspoon had been violated.* Admittedly, there was a continuing objection of the defense, but it was one directed to the state's intention of excusing jurors who

*Witherspoon v. Illinois, 391 U.S. 510 (1968).

were opposed to capital punishment and it was based on grounds of relevance. (JA 3-5) There was no specific objection aimed at informing the trial judge that a given excusal was thought to be insufficient under Witherspoon standards.

As in Witt, at the time Murphy was excused, no one in the courtroom questioned the fact that his principles prevented him from sitting. The excusal was proper.

Darden also presents the theory that the incorrect standard was utilitized by the trial judge in determining that Murphy was unfit for service as a juror. He contends that the judge should have pursued the inquiry to determine whether, given Mr. Murphy's views, he could nevertheless subordinate those views and follow his duty as a juror.

Although this position is discussed in terms of proper "standard", it

is nothing more than a restatement of the second part of footnote 21 in Witherspoon, couched in Witt language. The fundamental premise of this claim is that the trial judge failed to determine whether Murphy's attitude would have prevented him from making an impartial decision as to guilt. This notion is precisely that which was merged and simplified in Witt. Also, the reasons for the simplification apply with equal force to this case.

Perhaps the most compelling of the reasons is the one dealing with the notion of impartiality. That Darden now claims insufficient questioning by the trial judge and that he moved to limit the voir dire examination on grounds of relevance sought but only one objective--to have potential friends on the jury. Obviously, if Darden could have seated twelve jurors who stated

that their opposition to capital punishment would not have prevented them from making an impartial decision as to his guilt, then he would have secured the very real possibility that their respective views towards capital punishment might have affected the deliberations on guilt.

This potential for impartiality flows only from the situation in which jurors are opposed to capital punishment, since the state never seeks to seat only those jurors who are vigorously in favor of capital punishment; it only excludes those whose views against it might interfere with their deliberations. Contrary to the announcement in Witherspoon, such a jury is not "death prone"; it is merely impartial. However, a jury composed of people to Darden's liking would be "life prone" in terms of personal, religious, or moral attitudes. In the latter,

the jury would be truly "prone" whereas in the former, it would merely be indifferent, or at least willing to consider the requirements of law.

The impartiality of the jury must remain inviolate. Whether considered under the Sixth Amendment as in Witt, or under the Fourteenth Amendment, no scheme of jury selection should be permitted which results in a jury "tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant or to the nature of the charges to be tried." Hoyt v. Florida, 368 U.S. 57, 59 (1961).

Contrary to the view of the court in Grigsby v. Mabry, 758 F.2d 226, 232, n. 11 (8th Cir. 1985), cert. granted sub nom. Lockhart v. McCree, no. 84-1865, we think that a juror's oath to follow the law might be affected by conscientious

objections. While serious and solemn, the oath might give way once a juror has heard the evidence and is faced with the grave responsibility of determining a defendant's fate.

Murphy was properly excused and nothing more was needed to demonstrate that his personal beliefs would have interfered with his proper functioning as a juror.

III

DARDEN WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRED BY THE SIXTH AMENDMENT

In what was ultimately treated as the petition for a writ of certiorari, Darden contended that the alleged lack of investigation into non-statutory mitigating evidence was due to counsel's mistaken belief that Florida law limited such evidence to that found in section 921.141(b), Florida Statutes (1973). Now Darden claims that:

> The decision not to investigate was not an informed, tactical judgment. Rather, it was reached because counsel neither knew the law nor attempted to investigate and find out the law governing sentencing.

(Appellant's brief, p. 47)

The inconsistency in these positions is quickly apparent. There simply can be no good faith argument that defense counsel failed to investigate

evidence in mitigation due to a restrictive interpretation of Florida law. The record simply belies this. First, counsel, due to statements made in a deposition of Mrs. Turman, considered putting the lady on the stand in hopes of telling the jury that although Darden had killed her husband, she did not think he should be put to death for it. (TT 880) For the jury to have heard the wife of the victim claiming death was not an appropriate penalty would have been a very compelling and persuasive tactic. (SA 75) Such an effort, while appropriate and commendable, is not one statutorily enumerated. In fact, it is not one even relevant. But, it certainly demonstrates the lack of restrictive belief of counsel.

Secondly, that counsel specifically told Darden that he could take the stand and talk to the jury and say anything at all in mitigation is further

evidence that counsel did not feel in any way limited by the statute. (TT 883)

The same holds true for the trial judge. He specifically told Darden that family situation or any other personal matter that would be pertinent would be admissible. (TT 884) After discussing the statute regarding enumerated circumstances in mitigation, the court again told Darden that he was not limited to "these things". (TT 887) The judge repeated that any other factors that were pertinent to full consideration of the case, the analysis of Darden and his family situation, his causes, or anything else pertinent to the appropriate sentence would be entertained. (TT 887, 888)

Neither judge nor attorney felt restricted. It is clear that if there existed <u>any</u> evidence of mitigation, then it would have been offered and received.

Thus, the question redounds to

whether Darden received an individualized sentencing proceeding based on factors peculiar to him and his case. In other words, whatever the reason, did the failure to produce non-statutory evidence deprive Darden of his right to be constitutionally sentenced?

To that end, we are of course required to determine, under Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984), whether there is a reasonable probability that, absent the alleged errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

The above naturally leads one into consideration of the prejudice prong of the ineffectiveness test. Petitioner maintains that had his attorneys done more investigative work they would have come up with considerable "mitigating" evidence in terms of family life and

background.* He then focuses on the period of time between the guilt and sentencing phase to support his claim that the lawyers were literally unprepared for the second hearing.

We initially emphasize that the period of time that may have transpired between the two phases of trial does not necessarily equate to the amount of time the lawyers spent preparing for that eventuality. All the passage of time indicates is exactly that, and nothing more. Obviously, the lawyers spent time contemplating their tactics and course of conduct. Public Defender Johnson

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*Petioner includes extensive statements of so-called fact which he says is in the record of his second habeas corpus proceedings. That cause, he indicates, will be the subject of a petition for writ of certiorari and a motion to consolidate. We know of no authority that enables a future petition to be the source of fact. Accordingly, we reject any assertion thereof. In any event, these "facts" were not before the district court in the original petition and the second petition was dismissed as an abuse of the writ.

testified that his investigator and others, had searched for mitigating evidence, but could find none. (HC 232) Chief trial counsel Goodwill likewise went through the statute and had been told by the trial judge that the defense would not be restricted to only those statutory items. (SA 74) Therefore, it is a fair conclusion that the process of investigating Darden's background took more than the ten or fifteen minutes transpiring between phases of the trial.

Interestingly, when petitioner had his opportunity in the habeas corpus hearing to prove his allegations, he failed to inquire whether the attorneys knew of any evidence he today contends was mitigating. He asked only of the junior attorney Maloney whether any investigation took place but neglected to make pertinent inquiry of either the Public Defender or chief trial counsel.

The state did inquire though, and was told that nothing relevant could be ascertained either at trial or then at the hearing, some five years later. (SA 50)

Equally interesting, is the fact that the public defender's investigator, in his search for evidence of mitigation, more than likely turned up Darden's extensive criminal history beginning in 1949. Contrary to what Darden presents in his brief, his criminal history is far, far more than he would have us believe. Darden is the proverbial career criminal. We dare say that had Darden's attorneys presented this so-called mitigating evidence of family background and portrayed Darden as a man of "solid, non-violent character", it would have been a guaranteed ticket to the electric chair since the prosecution would have presented rebuttal evidence of his criminal history which would have rendered any notion of

"goodness" utterly incredible.*

Moreover, the allegation of Darden's background and family history are nothing more than just that. We all have a family background and personal history. However, we fail to see how a so-called deprived upbringing was in any way relevant to mitigate the shocking nature of the acts Darden committed on the Turmans and Phillip Arnold.

We do not suggest that a person's background may never be properly utilized to mitigate the conduct of that individual; we submit only that a general personal history offers little, if

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*Darden is no novice in the system. Having been "in and out of jails for most of his adult life" he has become what is known as a "jailhouse lawyer". (HC 209) Perhaps because of this, Darden knew the danger of the trial judge reviewing his criminal record contained in a pre-sentence investigation report, and thus, personally asked that one not be considered. (TT 910)

Additionally, the defense did know of Darden's early deprived life and family background at least as early as October 17, 1973. (SR 92-94)

anything in terms of relevance. While Lockett v. Ohio, 438 U.S. 586 (1978), most assuredly established the right to present all evidence bearing on character and record of the accused, it very properly restricted presentation of that evidence to that which is relevant.

In short, while it is true that nothing in mitigation was offered on Darden's behalf, we think the record amply supports the reason as being because no such evidence existed.* The failure to present that which cannot be presented is not unreasonable.

The above is inextricably tied to consideration of the prejudice aspect of the test. Giving Darden the benefit of the evidence he says his attorney should have presented plus any other of

*Even the psychiatric report, hoped to be used positively at sentencing, (SA 74) contained a "devastating" opinion that Darden was just the kind of person who could have committed the crimes. (SA 76)

which he can think, there is no way that the balance of aggravating and mitigating circumstances did not warrant the sentence that was imposed. The weight of factors in aggravation was simply too much to overcome.

Giving the deference to the judgment of counsel that Strickland requires, perhaps it is prudent to remember that this case was either the first or one of the first captial cases arising out of Polk County, Florida. The trial judge had never presided over a capital case, much less sentenced anyone to death.*

We mention these facts only to suggest that trial strategy from a defense

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*It is common knowledge that no execution had taken place in Florida for twelve years preceding Darden's trial. Also, at a hearing on a motion to vacate in the trial court held on September 2, 1985, counsel for Darden mentioned that the trial judge had less than a year's experience on the bench, a fact which Judge Dewell acknowledged. The judge also mentioned, however, that he had practiced for a good many years and had handled captial cases both as a defense attorney and as a prosecutor.

standpoint was certainly an open matter. The attorneys were representing a capital defendant at trial being held in a different county. The lawyers were confronted with a verdict of guilty, an obviously sympathetic and compassionate judge, (TT 883-889) and an uncertain recommendation to be forthcoming from the jury. We submit that under these particular circumstances, the judgment calls of counsel are entitled to as much deference as possible. The defense had already figured correctly in deciding not to put on an alibi defense, one which would have been weak as best. Had that been done, the prosecution was prepared to present evidence in rebuttal which would have virtually destroyed any idea of alibi. (SA 16)

While it cannot be said that the defense was as successful in not presenting any evidence that Darden was a

non-violent, caring, and warm human being, it is nonetheless true that in light of the potential responsive evidence that the state could have presented, the decision only to make a plea for mercy was reasonable.

Considering the circumstances of trial, the facts known at the time of trial, and the lack of relevant mitigating evidence, Darden's lawyers rendered constitutionally effective assistance

CONCLUSION

Based on the above and foregoing, we respectfully request this Court to affirm the judgment of the Eleventh Circuit Court of Appeals which determined that Darden was entitled to no habeas corpus relief.

Respectfully submitted,

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